SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	DATE FILED February 26, 2025 3:40 AM FILING ID: 60C298C982B36 CASE NUMBER: 2024SA308
Original Proceeding City of Aurora Municipal Court Case Numbers J316178 & J317516 Honorable Shelby L. Fyles, Judge	
In Re: **The People of the State of Colorado**, *by and through the* **City of Aurora**, Plaintiff, v. **Danielle Ashley Simons**, Defendant.	▲ COURT USE ONLY ▲
Amy D. Trenary, # 46148 Appeal to Justice LLC P.O. Box 7593 Broomfield, CO 80021 (720) 560–3439 amy@appealtojustice.com *Appointed as Alternate Defense Counsel for Defendant Danielle Simons*	Case Nos: 2024SA308 2024SA309

REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all applicable requirements of C.A.R. 21 and C.A.R. 32, including all formatting requirements set forth in these rules. In addition, this brief complies with the word limit for principal briefs under C.A.R. 28(g)(1). It contains 5,638 words.

I acknowledge that this brief may be stricken if it fails to comply with any of the requirements of the Rules of Appellate Procedure.

s/ Amy D. Trenary
Amy D. Trenary
Atty. Reg. #46148

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Legislative Materials

Other Authorities

INTRODUCTION

Danielle Simons was issued summonses for two separate low-level trespass offenses. Exhibits C & E, Appx. pp. 15, 18. Each time, an Aurora police officer had the unfettered, unreviewable discretion to charge Ms. Simons either with violating a municipal ordinance or its identical statutory counterpart. Law enforcement filed both cases in the Aurora Municipal Court, where Ms. Simons faces up to 364 days in jail and a $2,650 fine for each charge. Exhibit P, Appx. p. 133. [1]

Ms. Simons was first charged with violating Aurora's motor vehicle trespass ordinance for sleeping in the passenger seat of a stolen car. There's no evidence she knew the vehicle was reported stolen. Exhibit Q, Supp. Appx. pp. 2-6. If the officer had instead charged her under the counterpart

[1] Aurora applies this same "general penalty" to almost all ordinance violations. Aurora City Code § 1-13 (Exhibit P, Appx. pp. 133-36). Mandatory minimum sentences apply to motor vehicle theft (60 days; 120 days for repeat offender); retail theft over $100 (3 days; 90 days for repeat offender; 180 days for 2+ time repeat offender); and defrauding a public establishment over $15 (3 days). *Id*. at § 1-13(j). Failure to appear carries a 10-day mandatory minimum "regardless of the disposition of the original charge." *Id*. at §§ 1-13(j)(2); 50-33(a), (d)(1) (Exhibit S, Supp. Appx. pp. 21-22).

state statute, the offense would be a class 2 misdemeanor with the penalty capped at 120 days in jail and a $750 fine. Petition (24SA308), pp. 5, 8-9.

Ms. Simons was subsequently charged with violating Aurora's municipal trespass ordinance. She was inside a house along with the owner's son, J.V.—who reportedly was not permitted to be there. There's no evidence Ms. Simons knew that J.V., who wore a key to the house on a necklace, wasn't allowed at his father's house. Exhibit R, Reply Appx., pp. 7-20. If she'd instead been charged under the counterpart state statute, this petty offense would be punishable by no more than 10 days in jail and a $300 fine. Petition (24SA309), pp. 5, 8-9.

The discrepancy between the penalty prescribed for these trespass ordinances as compared to their counterpart state statutes is astounding: *three times* as much jail time and *three-and-a-half times* the fine for motor vehicle trespass, and worse, *thirty-six times* as much jail time and *nine times* the fine for trespass. Petitions, pp. 8-9. Even under the state's much stricter limit, ten days in jail can produce devastating effects on a person's employment, finances, housing, family, and reputation—especially among the already vulnerable populations more likely to be caught up in low-level

offenses like trespass (*i.e.*, people struggling with substance use, mental and behavioral health conditions, poverty, and the systemic effects of oppression). But a year-long sentence adds re-entry challenges and virtually guarantees job and housing loss, major relationship damage, utter financial collapse, lingering stigma, and a lasting emotional toll. Aurora has no conceivable interests that can justify the likely difference in outcomes.

Aside from their practical consequences, sentences of this magnitude are irreconcilable with recent statewide efforts to both equalize and reduce punishments for misdemeanors and petty offenses. The interest in alleviating sentencing disparities throughout Colorado, including as a matter of racial equity, is an overriding state concern. Aurora offers no reasons to believe that imposing these exponentially higher trespass penalties is necessitated by some exclusively local concern. Aurora's sentencing scheme is therefore preempted to the extent it punishes trespass and motor vehicle trespass more harshly than permitted under state law. Charging Ms. Simons under the Aurora City Code also violated her right to equal protection because it more harshly punishes conduct identical to second- and third-degree trespass under state law.

As Aurora recognizes, Ms. Simons' consolidated C.A.R. 21 cases raise issues "virtually identical" to those in *In re People v. Camp*, 24SA276, which Ms. Simons has extensively incorporated by reference. Response, p. 2; *see* Petitions (citing Exhibit O). Following suit, Aurora largely adopts the positions taken in Westminster in *Camp*. Response, pp. 2-3, 5, 8-9, 11 & n.4. Ms. Simons now joins all of the arguments in Ms. Camp's reply brief, as supplemented here. She also adopts the equal protection arguments advanced by the Colorado Criminal Defense Bar (CCDB). *See* CCDB Amicus Brief, pp. 4-6 (adopting CCDB's Amicus Brief in *Camp*, pp. 2-17).

ARGUMENT

A. Aurora's excessive trespass penalties are preempted because sentencing equity is a statewide concern.

As a home rule municipality, Aurora has "plenary authority to regulate matters of local concern." *City of Commerce City v. State*, 40 P.3d 1273, 1279 (Colo. 2002); Colo. Const. art. XX, § 6. But its unqualified authority extends only to concerns that are *exclusively* local in nature. In other words, it's only when an ordinance is rooted in a purely local concern that it supersedes a conflicting state statute. Otherwise, the statute prevails. *City of Longmont v. Colorado Oil & Gas Ass'n*, 2016 CO 29, ¶¶ 17-18. In matters of

statewide or mixed state and local concern, local ordinances may "coexist" with state statutes as long as they don't conflict. *Id.* at ¶ 18 (citing *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061, 1066 (Colo. 1992)).

Aurora does not contest that a conflict exists between state and local law. The only question, then, is whether the Aurora's ordinances permitting trespass and motor vehicle trespass to be punished more harshly than permissible under state law "derives from a purely local concern." *Voss*, 830 P.2d at 1066. It does not. Aurora does not argue that it has an entirely local interest in imposing exponentially higher sentences on people convicted of trespass offenses. Its excessively punitive ordinance is therefore preempted by the statutory sentencing scheme, which was overhauled to ensure that low-level offenses like trespass are punished with uniformity, minimal discretion of state actors, and, at most, a short jail sentence.

1. Aurora's cited cases do not license municipalities to impose penalties that conflict with state law.

None of Aurora's cited cases holds that municipalities may impose harsher penalties than the state for identical conduct. In fact, they consistently point in the other direction. Aurora leans primarily on three older decisions—*Woolverton*, *Martin*, and *Wade*—but none actually endorses

the notion that municipalities can exceed state sentences for identical offenses. *Camp* Response, pp. 6, 8, 16-21 (citing *Woolverton v. City & Cnty. of Denver*, 361 P.2d 982 (Colo. 1961), *overruled on other grounds by Vela v. People*, 484 P.2d 1204 (Colo. 1971); *City of Aurora v. Martin*, 507 P.2d 868 (Colo. 1973); *People v. Wade*, 757 P.2d 1074 (Colo. 1988)); *see also* Colorado Municipal League (CML) Amicus Brief, pp. 13-15. None of these cases forecloses preemption, none squarely addresses the preemption issue at hand, and all include confusing or questionable reasoning that can't hold up to scrutiny.

Woolverton, 361 P.2d at 983-84,[2] dealt with a Denver ordinance regulating gambling that was expressly authorized by a state statute. The Court held that gambling was a matter of mixed, rather than strictly statewide, concern. Crucially, it did not address whether Denver could impose a harsher penalty than the state for identical conduct. Instead, its brief reference to the state's "inadequate remedies" was part of its

[2] In *Vela*, 484 P.2d at 1206, the Court overruled *Woolverton* to the extent it suggested that a home rule municipality's ordinance necessarily supersedes state statutes in strictly local matters. *Vela* clarified that a statute is not superseded unless there's a conflict. As in *Woolverton*, no penalty conflict was at issue in *Vela*.

determination whether gambling regulation fell within municipal authority. No penalty conflict was before the Court. *Woolverton* thus offers no support for Aurora's claim that home rule cities can punish more harshly than the state for the same offense.

City of Aurora v. Martin, 507 P.2d at 869, considered whether Aurora's assault-and-battery ordinance was preempted by a "practically identical" state statute that provided a *greater* penalty than Aurora's. Although the Court acknowledged that *Davis v. City & County of Denver*, 342 P.2d 674 (Colo. 1959), had invalidated a conflicting ordinance on the "independent ground" of differing penalties, *Martin* concluded a "mere difference in penalty provisions" does not necessarily create a conflict, especially when neither law forbade what the other allowed. *Id*. at 869–70. This Court likewise never addressed whether a municipality can impose a harsher penalty than the state for the exact same offense. Nothing in *Martin* licenses Aurora's harsher penalties.

Davis is the only case among those cited in *Martin* that squarely addressed a penalty conflict. In *Davis*, Denver's ordinance prohibiting driving with a suspended license was invalidated because driver licensing

and regulation were statewide concerns. 342 P.2d at 676–77. The Court also identified "the conflict in penalty" as a "separate and independent reason" for striking down the ordinance. *Id*. at 679–80. Although the ordinance and statute were "substantially the same," the ordinance imposed a 90-day jail term and $300 fine, while the statute allowed six months' jail time and a $500 fine. *Id*. at 675-76, 680. That discrepancy, the Court held, "furnishes a basis for declaring the ordinance to be void." *Id*. at 680. *Davis* thus held the converse of Aurora's position: that in matters of purely statewide concern, municipalities can't punish identical offenses *less* harshly.

Like the others, *Wade*, 757 P.2d at 1076, never confronted whether a municipality can exceed the state's maximum penalty for the same offense. Instead, it addressed whether Denver's ordinance could authorize a *longer term of probation* than the ordinance's own maximum jail time for operating an unsafe automobile. *Id*. at 1075–76. After resolving the preemption claim based on the express grant of municipal authority to regulate traffic offenses, the Court rejected the vague argument that Denver's sentencing scheme must mirror the state's "philosophy in sentencing," emphasizing local independence under home-rule principles. *Id*. at 1076–77.

Aurora and its allies seize on passing language in *Wade* to claim that municipalities may broadly impose penalties in conflict with state law. *See Camp* Response, pp. 6, 8, 20–21; CML Amicus, pp. 13–14. But *Wade* turned on a wholly different question—whether probation could exceed the municipal ordinance's own cap on jail time—and it nowhere suggests that home rule cities can punish identical offenses more harshly than the state. To the extent they treat *Wade* as precedent for conflicting local penalties, that reading distorts the Court's holding and ignores established limits on municipal power when statewide or mixed concerns are at stake.

All told, none of the cases Aurora cites establishes that a home rule municipality can punish more harshly than the state for identical conduct. Each decision either addressed different issues or never confronted a direct conflict where the municipality had the harsher penalty. These precedents therefore provide no authority for Aurora to impose longer jail terms than state law allows for the same offense.

2. Colorado has a compelling statewide interest in fair and uniform sentencing.

Aurora claims that Ms. Simons "does not identify any statewide concern to preclude Aurora from regulating trespass," and contends this

Court has recognized home rule municipalities' authority to regulate trespass. Response, pp. 6, 9. That misses the point. Aurora's authority to *regulate* trespass is not what's at issue here; it's the *punishment* that matters. Nobody's arguing that Aurora can't enact or enforce trespass ordinances. But if a municipality chooses—as Aurora has—to enact ordinances identical to offenses under state law, it is preempted from punishing the same conduct more harshly than the state allows. *See Commerce City*, 40 P.3d at 1279.

As Ms. Simons identifies in her petitions, an overriding statewide interest in sentencing equity preempts Aurora from enacting penalties for trespass that are exponentially greater than permitted for identical offenses under state law. Petitions, pp. 7-8. "The country's renewed attention toward racial equity in criminal legal systems nationwide has revealed continuing, significant racial disparities in these systems." Exhibit T, Supp. Appx. p. 90. Colorado's recent investments in reclassifying and overhauling the sentencing grid for misdemeanors and petty offenses reflect the inter-related aims of constricting the permissible sentences for these low-level crimes; promoting uniformity in sentences throughout the state, including by

curtailing the discretion of individual state actors; and thereby promoting racial justice. *Camp* Petition, pp. 1-2, 8-13.[3]

In 2007, the General Assembly created the Colorado Commission on Criminal and Juvenile Justice (CCJJ) to conduct evidence-based analyses of Colorado's justice system. The Commission's directives included addressing concerns about the department of corrections' extraordinary budget; maximizing the cost efficiency of limited criminal justice resources; and directing resources toward "inadequately addressed" factors, including substance abuse, mental illness, and poverty. 2007 Colo. Sess. Laws, Ch. 272, sec. 1 (§ 16-11.3-101(1)). The CCJJ's duties included analyzing "the effectiveness of the sentences imposed" and investigating "effective alternatives to incarceration." *Id*. (§ 16-11.3-103(2)(a)-(b)). The following year, the legislature added the CCJJ's duty of studying and making

[3] The statewide interest in advancing racial justice through sentencing equity holds particular significance for Aurora, as it is "one of most diverse cities in Colorado," with 39% of residents identifying with a race other than white or Caucasian, 16% identifying as Black, and 28% identifying as Hispanic or Latino. *See* Exhibit T, Supp. Appx., pp. 72-73 & n.68 (Bureau of Justice Assistance, *Review of the Aurora, Colorado Municipal Public Defense System* (Sept. 2021)).

recommendations concerning "the reduction of racial and ethnic disparities within the criminal and juvenile justice systems." 2008 Colo. Sess. Laws, Ch. 40, sec. 1 (§ 16-11.3-103(2)(e)).

By 2020, efforts to address racial and ethnic disparities became an urgent matter of state-wide public policy. That spring, protests erupted across the state and nation, seeking to draw attention to the life-and-death consequences of perpetual racial and ethnic disparities in the criminal legal system. Throughout May and June 2020, thousands of Coloradoans took to the streets to protest racial injustice, demanding an end to the inequalities and disparities throughout the entirety of Colorado's criminal justice system, and especially the harms disproportionately inflicted on people based on race. *See* Exhibit T, Reply Appx., p. 73 ("People accused of crimes are disproportionately Black, Brown, and otherwise marginalized by society."). Although the galvanizing event for this wave of activism was the murder of George Floyd by law enforcement officers in Minneapolis, that was but one instance among a pattern of historically entrenched systemic victimization of people of color. *See* Exhibit 3, *Camp* Appx., pp. 9-11 (including n.1, citing contemporaneous news reports about protests).

Around this same time, "national attention turned to Aurora as news emerged about the August 2019 death of Elijah McClain, a Black man, following his encounter with police in Aurora." This focused a "spotlight on Aurora in the national reckoning on racial equality and police violence…." Exhibit T, Reply Appx., p. 72 & n.65.

On June 24, 2020, Governor Jared Polis sent his biannual letter to the CCJJ specifically referencing these protests, which he stated "have only further underscored the existing inequities and disparities that exist in our county and our state." Exhibit 4, Camp Appx., pp. 32-34. The Governor implored the CCJJ to focus on "one of the most difficult issues affecting both adults and juveniles in the justice system, especially for people of color: sentencing calibration." He cited his own focus, as Governor, on "building a better Colorado for all," which includes "treating every individual with fairness and equity." Sharpening the focus on sentencing, the letter stated: "Our sentencing scheme should be rational, just, and consistent so that the punishment fits the conduct. Sentences should be grounded in anti-bias principles and equity, regardless of race, ethnicity, gender, geography, socio-economic status, disability, or any other intersecting identities that

may affect sentencing." To guide the CCJJ's work, Governor Polis included a list of topics, one of which was: "Ensuring statewide consistency in the application of sentencing guidelines that mitigate the effects of individual discretion by system actors."

In September 2020, in response to this letter, the Sentencing Reform Task Force (SRTF) subcommittee was formed under the CCJJ, specifically to address the sentencing concerns in Governor Polis's biannual letter.[4] In October 2020, the SRTF created a handout identifying its "Guiding Principles." First on its list was this: "Sentencing policy should encompass fairness, transparency, proportionality, and consistency." Another guiding principle was: "A continuum of sentencing options should be available, with imprisonment reserved for the most serious and dangerous offenders."[5]

Within the SRTF, the "Sentence Structure Working Group" was formed to work toward establishing sentencing ranges, creating felony and misdemeanor sentencing grids, and promoting consistency and certainty in

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[4] https://ccjj.colorado.gov/ccjj-srtf

[5] https://cdpsdocs.state.co.us/ccjj/committees/SRTF/Materials/2020-10-07_CCJJ-SRTF-GuidingPrinciples.pdf

sentencing.[6] By 2021, the Sentence Structure Working Group's recommendations were adopted by the General Assembly through passage of SB21-271, which represented a comprehensive overhaul of the sentencing scheme for misdemeanors, petty offenses, and civil infractions. The sentencing exposure for many low-level offenses was reduced; for some offense classifications, dramatically so. *See* 2021 Colo. Sess. Laws, Ch. 462, secs. 186 & 187. CCJJ's Legislative Fact Sheet for SB21-271 expressly identifies that these reforms were driven by the goal of "eliminating disparities based on race." Exhibit 5, *Camp* Appx., p. 36.

Senate Bill 21-271's overhaul of the sentencing paradigm for low-level offenses was accomplished by coordinated efforts throughout the branches of government. *See Camp* Petition, pp. 10-12; Exhibit 4, *Camp* Appx., p. 32 (describing contributions of the governor, judiciary, General Assembly, individual legislators, and the CCJJ). CCJJ's Legislative Fact Sheet similarly reflected "strong concerns *from many different stakeholders* about the lack of certainty that exists regarding the amount of time a person will serve when

[6] https://ccjj.colorado.gov/ccjj-srtf
(Subgroups → Sentence Structure Working Group)

sentenced to incarceration." Exhibit 5, *Camp* Appx., p. 36 (emphasis added). Working together, stakeholders throughout state government shepherded SB21-271 into law and thereby effectuated the statewide commitment to "consistency and certainty in sentences" by ensuring the penalty for low-level offenses like trespass is limited to a "short jail sentence" or "fine only." *Id*. at pp. 36-37; *see also People v. Phillips*, 652 P.2d 575, 579 (Colo. 1982) (presumptive sentencing ranges reflect the legislature's concern that sentencing "be fair and consistent" and offense classifications ensure "fairness and consistency by eliminating unjustified disparity in sentences").

"[C]onceptions as to what is local and what is state-wide are not 'eternalized' but rather depend for their meaning upon time and circumstance." *City & Cnty. of Denver v. Pike*, 342 P.2d 688, 692 (Colo. 1959). The Court should therefore look to changing conditions when weighing the relevant interests of the state and municipality. *Id.*; *Webb v. City of Black Hawk*, 2013 CO 9, ¶ 19. Although Colorado evidently has not always evinced an overriding interest in sentencing equity and racial justice, "as times have changed, so too have the state's concerns." *Camp* Petition, p. 9. The racial justice protests in the wake George Floyd's murder set the state on a path

that led directly to the complete recalibration of how Colorado punishes misdemeanors and petty offenses. The underlying objective of reducing sentencing disparities is a matter of statewide concern over which the legislature has "supreme authority." *Commerce City*, 40 P.3d at 1279 (Colo. 2002).

The overall objective, as articulated by Governor Polis, of "[e]nsuring statewide consistency in the application of sentencing guidelines that mitigate the effects of individual discretion by system actors," Exhibit 4, *Camp* Appx., p. 33, is by its very nature a matter of statewide concern. As this Court observed a half-century ago, "a uniform system of justice throughout all of the courts of the state of Colorado, including municipal and police courts, is of paramount importance to all of the citizens of the state, and tends to promote the achievement of the ideal of equality of justice." *Hardamon v. Mun. Court in & for City of Boulder*, 497 P.2d 1000, 1002 (Colo. 1972). If Aurora is allowed prescribe harsher penalties than the state for the same offense, so too can neighboring municipalities. The pages-long charts of municipal penalties for trespass and theft attached to CML's amicus briefs here and in *Camp* highlight the chaotic patchwork of divergent

sentencing schemes this creates. Under this system, where a person's sentencing exposure for misdemeanor and petty offenses hinges on little more than zip code and the happenstance of where each individual police officer decides to file the case, the state's interest in equity, uniformity, and minimal individual discretion is unachievable.

Aurora identifies no purely local need for stiffer trespass penalties than state law calls for. Its bald assertion about the general need "for differentiating urban crimes from non-urban crimes" is unavailing, and its appeal to the "desire to curb motor vehicle theft and to protect against potential burglaries" cannot serve as the justification for harsher *trespass* sentences. Response, p. 11. Regardless, even if punishing—or even generally regulating—misdemeanor and petty trespass is deemed a matter of mixed state and local concern, Aurora's penalties are still preempted because they conflict with the statutory penalty grid. *See Hardamon*, 497 P.2d at 1003 n.2 (noting it "would not change the outcome" if the matter were of mixed rather than statewide concern because "strong state interests preclude the matter from being characterized as strictly local, the conflicting home rule ordinance must fall under either characterization").

Finally, Aurora agrees that SB21-271's legislative history "references eliminating sentencing disparities," but asks the Court to focus only on the mechanisms the state has thus far employed to address such disparities. Response, pp. 9-10. This oversimplifies, and thereby undermines, the preemption analysis by conflating *actions* with *interests*. But even if the state's actions did circumscribe the extent of its interest, Aurora does not contend that the failure to take specific actions (for example, amending the general penalty limits in section § 13-10-113(1)(a), C.R.S. (2024)), renders the interest in sentencing regularity a matter solely of local concern. And again, in the absence of an exclusively local concern, Aurora's sentencing scheme is superseded by conflicting state law. *City of Longmont*, ¶¶ 17-18.

In short, Aurora's harsher penalties lack any justification rooted in purely local concern and clash with the statewide interest in uniform sentencing. To give effect to Colorado's interest in ensuring sentencing consistency and equity throughout the state, Aurora's penalty scheme must give way under the preemption doctrine.

B. This Court should uphold Colorado's longstanding equal protection doctrine rather than abandon it.

Even if Aurora sidesteps the preemption problem, it faces an equally insurmountable one: Colorado's robust equal protection guarantees. Aurora and its amici, Denver's District Attorney and City Attorney, urge this Court to abandon its firmly established equal protection doctrine under the Colorado Constitution in favor of the approach taken in *United States v. Batchelder*, 442 U.S. 114 (1979). *See* Response, pp. 6-7, 18, 24-34; Denver Amicus Brief, pp. 4-10. The Court should decline. In the nearly half-century since *Batchelder* was decided, this Court has repeatedly re-affirmed its commitment to the equal protection doctrine grounded in the Colorado Constitution's due process clause. *See Camp* CCDB Amicus Brief ("CCDB"), pp. 6-7. Neither Aurora nor this case offers any compelling justification for abandoning the Court's longstanding, rational, and fair rule.

1. Our Constitution's robust guarantee of equal protection requires equal punishment for identical conduct.

"Equal protection of the laws assures the like treatment of all persons who are similarly situated." *Dean v. People*, 2016 CO 14, ¶ 11. To effectuate the guarantee of equal protection, this Court has long recognized that

"statutes which prescribe different punishments for the same violations committed under the same circumstances by persons in like situations are void as violative of the equal protection of the laws." *Trueblood v. Tinsley*, 366 P.2d 655, 659 (Colo. 1961); *see also People v. Calvaresi*, 534 P.2d 316, 318-19 (Colo. 1975) (reasoning that "different degrees of punishment for the same acts committed under like circumstances" is arbitrary and unreasonable).

At its origins, Colorado's doctrine was grounded, vaguely, only in "equal protection principles of the constitution." *Trueblood*, 366 P.2d at 658-59. In its earliest cases throughout the 1960s and into the '70s, when discussing the prohibition against unequal punishment for identical conduct the Court referenced neither the federal nor state constitution. *See id.*; *Vanderhoof v. People*, 380 P.2d 903, 904 (Colo. 1963); *Specht v. Tinsley*, 385 P.2d 423, 425 (Colo. 1963); *Specht v. People*, 396 P.2d 838, 839-40 (Colo. 1964); *People v. Bowers*, 530 P.2d 1282, 1283 (Colo. 1974). The first case to specify appears to have been *People v. Harris*, 531 P.2d 384, 384-85 (Colo. 1975), citing the federal constitution (perhaps only because that was the cited basis of the district court's order on appeal; subsequent opinions went back to the unspecified prior characterization). Just four years after *Harris*, the United

States Supreme Court threw a wrench in the works, holding that the equal protection clause under the Fourteenth Amendment does not protect a defendant from being prosecuted under the statute with the harsher penalty when conduct violates more than one criminal statute. *Batchelder*, 442 U.S. at 124-25; U.S. Const. amend. XIV, § I.

When confronted, just six weeks later, with the decision whether to follow *Batchelder*, this Court chose instead to chart its own course—from which it has never looked back. The Court unanimously concluded that it was "not persuaded by the Supreme Court's reasoning" in *Batchelder* and therefore "expressly decline[d] to apply it to our own State Constitution's due process equal protection guarantee." *People v. Estrada*, 601 P.2d 619, 621 (Colo. 1979). Although the Colorado Constitution contains no language expressly guaranteeing equal protection, this Court recognized decades before *Estrada* that equal protection is an inherent guarantee under our state constitution's due process clause. *People v. Max*, 198 P. 150 (Colo. 1921); *see Dean v. People*, 2016 CO 14, ¶ 11 (citing Colo. Const. art. II, § 25; *People v. Stewart*, 55 P.3d 107, 114 (Colo. 2002)).

The Supreme Court has expressly acknowledged that each state retains the "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *PruneYard Shopping Ctr.*, 447 U.S. at 81; *accord Cooper v. California*, 386 U.S. 58, 62 (1967) (states have the "power to impose higher standards… than required by the Federal Constitution"). In short, Colorado is free "to forge our own path." *Bock v. Westminster Mall Co.*, 819 P.2d 55, 58 (Colo. 1991) (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980)). Indeed, that's just what this Court has done with its equal protection doctrine.

"In sharp contrast to *Batchelder*," this Court has held "consistently that equal protection of the laws requires that statutory classifications of crimes be based on differences that are real in fact and reasonably related to the general purposes of criminal legislation." *People v. Marcy*, 628 P.2d 69, 74 (Colo. 1981). Since *Estrada*, this Court has repeatedly reaffirmed the equal protection doctrine that's integral to the due process clause of the Colorado Constitution. *See*, *e.g.*, *People v. Lee*, 2020 CO 81, ¶¶ 12-14; *Dean*, ¶ 14; *People v. Wilhelm*, 676 P.2d 702, 704 (Colo. 1984). Although a substantial majority of states have opted to follow *Batchelder*, even under their own state

constitutions, this Court has maintained its steadfast commitment to the broader protections recognized under our state constitution. *Lee*, ¶ 13; *but see id*. at ¶ 45 n.2 (Samour, J., dissenting) (identifying other holdout states as Hawaii, Utah, Kansas, and Maryland).

2. Colorado's unique equal protection framework is perfectly suited for facial challenges to conflicting state and local penalties for the same conduct.

Aurora and the Denver amici urge the Court to abandon its equal protection doctrine entirely in favor of *Batchelder*. But to settle the narrow question presented here—whether equal protection is violated when a virtually identical statute and ordinance punish conduct differently—the Court need not decide whether wholesale abandonment of its longstanding equal protection doctrine is warranted. All that's necessary here is to affirm that the doctrine applies when presented with: (i) a facial challenge, (ii) to a municipal ordinance,[7] (iii) with elements virtually identical to a counterpart

[7] Ms. Simons adopts Ms. Camp's arguments and reasoning why this Court's equal protection doctrine applies with the same force in the context of municipal ordinances. *Camp* Reply, pp. 16-23.

statute. At least in these discrete circumstances, maintaining this Court's equal protection rule provides a perfect fit.

A leading criminal law treatise—which continues to express skepticism about the sweeping reach of *Batchelder* nearly a half-century after it was announced—identifies three distinct types of claims that conduct meets the elements of two laws with different punishments:

- (1) where one is a lesser-included offense of the other;
- (2) where the elements overlap; and
- (3) where, as here, the elements are identical.

Wayne R. LaFave et al., *Criminal Procedure* § 13.7(a), Westlaw (4th ed. updated Nov. 2024). "The Court in *Batchelder* had before it a situation falling into the second category but seems to have concluded that the three statutory schemes are indistinguishable for purposes of constitutional analysis." *Id*.

Professor LaFave and his co-authors find the application of *Batchelder*'s reasoning to the third category (two laws with identical elements) "highly objectionable" because "such a scheme serves no legitimate purpose." *Id*. "There is nothing at all rational about this kind of statutory scheme, as it

provides for different penalties without any effort whatsoever to explain a basis for the difference." *Id*. This concern for rational distinctions is the exact rationale this Court has repeatedly held out as the force behind its unique equal protection doctrine. *See Marcy*, 628 P.2d at 80 ("an evenhanded application of the law turns on reasonably intelligible standards of criminal culpability"); *Estrada*, 601 P.2d at 621 ("a penalty scheme that provides widely divergent sentences for similar conduct and intent to be irrational"); *Calvaresi*, 534 P.2d at 318-19 (classifications must be "reasonable and not arbitrary"); *cf. State v. Rooney*, 19 A.3d 92, 109 (Vt. 2011) (Johnson, J., dissenting) (where "two classes of defendants who have committed identical element crimes and the prosecutorial choice turns on little more than whim").

Among its reasons for urging this Court to change course, Aurora asserts that comparing the elements of an ordinance to its counterpart statute is too complicated and time-consuming. *See* Response, p. 15 ("The *Trueblood* rule's element-by-element comparison tends to be intricate, and typically consumes pages of published judicial opinions."); pp. 15-16 (claiming a police officer's ability to apply the rule "may require hours—if not days—of

analysis"). To prove its point, Aurora cites a Utah case stating that comparing elements requires "an exquisitely detailed dissection" of the statutory language. Response, p. 15 (citing *State v. Williams*, 175 P.3d 1029, 1033 (Utah 2007)). In *Williams*, this phrase was used to describe the analysis in *State v. Fedorowicz*, 52 P.3d 1194, 1206–08 & n.2–3 (Utah 2002). But that analysis boiled down to this: two statutes did not proscribe identical conduct because one requires "serious physical injury," the other requires "physical injury," and their statutory definitions are expressly mutually exclusive.

The facial analysis of an equal protection claim requires just two questions. *See* Petition, p. 11; *Camp* CCDB Amicus, pp. 8-9. *First*, do the ordinance and statute proscribe conduct that is identical or so similar that a person of average intelligence could not distinguish between the two? In response to Ms. Simons' contention that Aurora's trespass and motor vehicle trespass ordinances proscribe the identical conduct as their state law counterparts, Petitions, pp. 11-12, Aurora offers no "exquisitely detailed dissection" of the statutory language. *See* Response, pp. 15-16. Instead, it apparently takes as a given that the elements are identical. *Second*, if the two proscribe indistinguishable conduct, and does one punish more harshly than

the other? As Ms. Simons explained throughout her Petitions, they obviously do—and Aurora never contends otherwise.

The ease of this comparison is readily demonstrated by applying it to the ordinances Ms. Simons is charged under. First, motor vehicle trespass:

Aurora City Code § 94-83	**§ 18-4-503(1)(c), C.R.S.**
A person commits the crime of motor vehicle trespass if such person knowingly and lawfully enters and remains in a motor vehicle of another.	A person commits the crime of second degree criminal trespass if such person… [k]nowingly and unlawfully enters or remains in a motor vehicle of another.

See Petition (24SA308), pp. 8-9, 11. The comparison for trespass, while slightly more nuanced because it requires cross-referencing the statutory definition, is still uncomplicated:

Aurora City Code § 94-71(a)(6)	**§§ 18-4-201(3), 18-4-504(1), C.R.S.**
A person commits trespass if that person… [w]ithout being licensed, invited by a person with authority, or otherwise privileged, enters or remains in or upon premises of another.	A person commits the crime of third degree criminal trespass if such person unlawfully enters or remains in or upon premises of another. A person "enters unlawfully" or "remains unlawfully" in or upon premises when the person is not licensed, invited, or otherwise privileged to do so.

See Petition (24SA308), pp. 8-9, 11-12 & n.2.

Aurora's argument that its officers are unable handle quickly parsing elements like these lacks merit. Moreover, it calls into question whether these same officers should be vested with the standardless, unreviewable authority to choose which law to charge people under and, by implication, which maximum sentence is most appropriate under the circumstances.

Applying this Court's categorical equal protection analysis here illustrates just how well suited it is for a facial challenge to a municipal ordinance whose statutory counterpart carries a harsher punishment. At least for this type of equal protection claim, the Court should once again reaffirm its well-settled equal protection doctrine under the due process clause of the Colorado Constitution.

CONCLUSION

Aurora's excessively harsh penalties for trespass offenses undermine Colorado's statewide commitment to uniform and equitable sentencing of low-level offenses and violate equal protection by applying harsher penalties than what's permitted under state law. The Court should therefore make the order to show cause absolute and remand to the Aurora Municipal Court with directions to dismiss both trespass summonses.

To the extent oral argument will assist the Court in resolving these issues, Ms. Simons joins the requests of the municipalities and Ms. Camp.

DATED: February 26, 2025.

s/ Amy D. Trenary
Amy D. Trenary, #46148
Counsel for Petitioner
Danielle Simons

LIST OF SUPPLEMENTAL SUPPORTING DOCUMENTS

Exhibit Q: Aurora Police Department Narrative Reports
Motor Vehicle Trespass – J316178

Exhibit R: Aurora Police Department Narrative Reports
Trespass – J317516

Exhibit S: Aurora City Code § 50-33

Exhibit T: Bureau of Justice Assistance, *Review of the Aurora, Colorado Municipal Public Defense System* (Sept. 2021)

CERTIFICATE OF SERVICE

I certify that on February 26, 2025, this **REPLY BRIEF** was filed with the Colorado Supreme Court and was served by the Colorado Courts E-Filing System on all parties of record.

s/ Amy D. Trenary